NO. 48862-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO GUZMAN RODRIGUEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable G. Helen Whitener, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in entering judgments for both attempted second degree murder and first degree assault in violation of the constitutional prohibition against double jeopardy.

Issue Pertaining to Assignment of Error

Double jeopardy protects against dual convictions for the same offense. In In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) our Supreme Court held that where the evidence required to support the substantial step element of attempted murder is sufficient to establish first degree assault, the attempted murder and assault are the same in fact and in law and convictions for both violated double jeopardy. Appellant was convicted of attempted second degree murder and first degree assault. The evidence that supported the substantial step element of the attempted murder conviction was the strangulation of the named victim and that was the same evidence that established the first degree assault conviction for assaulting the same person with a deadly weapon or by any force or means likely to produce great bodily harm or death. Did the court err in entering judgment against appellant for both attempted second degree murder and first degree assault in violation of double jeopardy?

B. STATEMENT OF THE CASE [1]

1. Procedural Facts

The Pierce County Prosecutor charged Francisco Guzman Rodriguez with one count of attempted first degree murder (Count I) and one count of first degree assault (Count II) by alternative means. CP 27-29. It was alleged the first degree assault was committed with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death and in the alternative that it resulted in the infliction of great bodily harm. CP 28; RCW 9A.36.011(1)(a) and (c).

Leonila Mejia Albino was the named victim in both charges. CP 27-28. It was alleged both crimes occurred on or about June 4, 2015, and it was alleged in each count the crime was aggravated because it involved domestic violence and the offense occurred "within sight or sound of the victim's or the offender's minor children under the age of eighteen years" or the "offense manifested deliberate cruelty or intimidation of the victim." CP 27-28.

A jury acquitted Guzman Rodriguez of the attempted first degree murder as charge but found him guilty of the lesser included offense of attempted second degree murder (Count I). CP 76-77. Guzman Rodriguez

[1] The verbatim report of proceedings consists of 12 volumes that are identified by Roman Numerals. Counsel's citations to the verbatim report of proceedings replaces the Roman Numerals with numbers followed by RP. For example, volume I of the verbatim report of proceedings is referred to as 1RP, volume II as 2RP and so on.

was also found guilty of the first degree assault charge (Count II). CP 82. The jury was unable to agree on both alternative of means of committing first degree assault. It was only unanimous that the assault was committed "with a deadly weapon or by any force or means likely to produce great bodily harm or death." Id. By special verdict the jury found both the first degree assault and attempted second degree murder were aggravated domestic violence offenses. CP 78, 81.

The state conceded, and the court agreed, the two offenses constituted the same criminal conduct because they were both were committed against the same victim at the same time and place, involved the same intent, and were a result of the "same act or series of acts." 12RP 15. The court imposed an exceptional sentence. CP 106-111. Based on an offender score of 0 for each offense, Guzman Rodriguez was sentenced to concurrent sentences of 147 months on the attempted second degree murder and 123 months on the first degree assault. CP 96, 110; 12RP 27. The court imposed an additional 48 months based on the jury's special verdict finding that the offenses were committed within the sight or sound of Mejia Albino's four minor children and involved deliberate cruelty. CP 108-109. The court imposed an additional 12 months for each minor child to justify the 48 additional months. 12RP 27. Thus, the total sentence imposed was 195 months. CP 96, 109.

Substantive Facts

On June 4, 2015 Guzman Rodriguez and Mejia Albino were living together in an apartment in Tacoma. 6RP 32. Living with them were Mejia Albino's three minor children and a child they had together. 6RP 31. A few months earlier their relationship had ended, and Mejia Albino testified Guzman Rodriguez was "fine" with that although everyday he told her that he did not want her to leave him. 6RP 33. Mejia Albino planned on finding another place to live with her children. 6RP 34.

On May 30, 2015, Mejia Albino had a tonsillectomy. 6RP 35; 8RP 155. A few days later, on June 3rd, Mejia Albino returned home at about 10:00 p.m. from a trip to the drug store to pick up her prescriptions. 6RP 36-37. When she got home Guzman Rodriguez and she talked about her moving out, and what she was taking with her when she left. Guzman Rodriguez told her that he was planning on going back to Mexico. 6RP 38-39. Mejia Albino testified everything seemed normal. 6RP 37.

Guzman Rodriguez and Mejia Albino had stopped sleeping together. It was decided Guzman Rodriguez would sleep on the couch in the living and Mejia Albino would sleep in on of the two bedrooms. 6RP 39. In that bedroom there were two beds. Mejia Albino slept in the bigger of the two beds with her youngest daughter, and her youngest son slept in

the other bed. Her other daughter and son slept in the second bedroom. 6RP 39-40; 7RP 21.

Mejia Albino took a pain pill because of the pain in her throat caused by her recent tonsillectomy and went to bed at about 11:30 p.m., but she had difficulty sleeping because of her sore throat so she stayed awake until about 2:00 a.m. texting a friend before she went to sleep. 6RP 41-42, 101-102. A couple hours later she woke up and Guzman Rodriguez was kneeling on the bed with a scarf in his hands. 6RP 44. According to Mejia Albino, Guzman Rodriguez told her that she was not going to leave and he had to kill her. He put the scarf around her neck and tightened it. 6RP 44-46.

Mejia Albino tried to yell for her oldest daughter, grabbed the scarf around her neck and at the same time pushed Guzman Rodriguez. 6RP 46. The two fell to the floor and Guzman Rodriguez let go of the scarf. Mejia Albino told him to think of the children and he said he did not care. They stood up and Mejia Albino said Guzman Rodriguez put his hands around her neck and squeezed. 6RP 47-48. Mejia Albino did not know if she fainted but the next thing she remembered was holding onto a table and then going into the bathroom. 6RP 49-51, 108. Mejia Albino testified she locked the bathroom door and looked at herself in the bathroom mirror and saw that her face was purple and her eyes were red. 6RP 52.

Mejia Albino said Guzman Rodriguez knocked on the bathroom door and screamed at her to open it. 6RP 53, 81. After about 10 minutes, Mejia Albino heard her eldest daughter, 14 year-old A.P., ask Guzman Rodriguez what was going on and she heard Guzman Rodriguez respond that he did not know. 6RP 29, 82. Her eldest son, who was 10 years old, wanted inside the bathroom and Guzman Rodriguez and A.P. told Mejia Albino the boy had to go to the bathroom so Mejia Albino opened the door. 6RP 29, 83.

After she opened the door Mejia Albino told A.P. to call police. She heard A.P. again ask Guzman Rodriguez was going on. He said he did not know but that he would call police. 6RP 84. Mejia Albino testified as A.P. was calling the police she left bathroom and went into the living room. Guzman Rodriguez was in the living room and Mejia Albino told A.P. to tell police Guzman Rodriguez wanted to kill her. 6RP 85-86. Guzman Rodriguez left the apartment. 6RP 86.

A.P. testified that she woke up when she heard Mejia Albino scream, "stop" and "leave me alone." 7RP 23. Mejia Albino was banging on the bathroom door and telling Guzman Rodriguez to go away. 7RP 26. A.P. asked Guzman Rodriguez what was going on and he told her Mejia Albino had a bad dream that he had done something to her. 7RP 26-27. A.P. said the bathroom was unlocked but Mejia Albino was pushing

against it so nobody could get inside. A.P. opened the door slightly and Mejia Albino told her to call police. 7RP 27. A.P. got the phone and went outside to call police. 7RP 28. A.P. testified she believed Guzman Rodriguez had left before she went back inside after calling police. 7RP 31.

The police arrived at a little after 4:00 a.m. 5RP 42. Officer Jimmy Welsh was speaking with A.P. outside when Mejia Albino came out of the apartment. Welsh noticed her face was dark red and purple and her eyes were red and bulging. 5RP 43-47, 60. He directed Mejia Albino to waiting fire department personnel and then left to look for Guzman Rodriguez in the direction where A.P. told him she had last seen him. Welsh found Guzman Rodriguez hiding behind some cars in an alley trying to use his cell phone. 5RP 50-51. Guzman Rodriguez appeared intoxicated, his speech was impaired and he smelled of alcohol. 5RP 51.

Guzman Rodriguez was arrested, and he spoke to a Spanish speaking officer after he was advised of his rights. 7RP 43-47. The officer could also tell that Guzman Rodriguez had been drinking. 7RP 50-51. Guzman Rodriguez told the officer Mejia Albino ran out of the house for some unknown reason. Guzman Rodriguez said Mejia Albino told him she was leaving him for another man. He denied he touched her. 7RP 49.

A few hours later, at the police station, Guzman Rodriguez again spoke with police through another Spanish speaking officer. He told police he was drinking Tequila when he saw Mejia Albino run out of the bedroom and into the bathroom with a scarf around her neck. 7RP 62-63. When he tried to find out what happened she pushed him away and yelled for someone to call police. 7RP 63. Guzman Rodriguez told police he thought maybe Mejia Albino's youngest son tied the scarf around her neck then he started crying and said maybe he pushed her and pulled her to the floor. He said maybe he hit her. 7RP 65. He said he loved Mejia Albino and when he found out she was leaving it hurt him. 7RP 66, 72.

Meanwhile Mejia Albino was first taken to St. Clare's hospital where an emergency room physician saw her. The physician testified Mejia Albino said she was strangled but she never lost consciousness. 8RP 135-136. Her face had a purplish hue but her eyes, breathing and vocal cords were normal. 8RP 129, 139-141. Mejia Albino was oriented to time, place and persons and there was no injury to her brain or the arteries in her neck. 8RP 139, 142, 145. Mejia Albino was then sent to St. Joseph hospital because it has a trauma center. 8RP 146.

At St. Joseph's a trauma surgeon examined Mejia Albino. 5RP 101-103. Mejia Albino's head had petechial hemorrhage, which is caused by the breaking of tiny blood vessels under the skin. 5RP 109; 8RP 27.

The vessels break when blood backs up into the head because of pressure to the neck that does not allow the blood to flow from the brain. 5RP 109-111. A CT scan showed no significant injuries, and Mejia Albino's breathing, vital signs, head, pupils, and airway were all normal. 5RP 114, 120-125, 133. Mejia Albino denied she ever lost consciousness. 5RP 121.

Forensic nurse Lynne Bertiaume was at St. Joseph's when Mejia Albino came in and Bertiaume asked to assist the surgeon. 8RP 39. Bertiaume opined Mejia Albino showed signs of sever strangulation. 8RP 50-60, 78. Bertiaume testified 11 pounds of pressure applied to the neck for ten seconds or less could cause a person to lose consciousness and 33 pounds of pressure could cause the carotid arteries--which carries blood from the heart to the brain—to occluded and the person could die within three minutes. 8RP 26, 30-31. Bertiaume testified that although Mejia Albino's tests and medical records indicated she had not suffered any life threatening injuries, and the doctors wanted to discharge her. Bertiaume insisted Mejia Albino be kept for a few days to determine if there were later complications. 8RP 90. Although Mejia Albino told the emergency room physician at St. Clare's hospital and the trauma surgeon at St. Joseph's hospital she never she lost consciousness, and there was no medical evidence she lost consciousness, Bertiaume opined Mejia Albino lost consciousness because she reported to EMS personnel that at one

point everything went black. 8RP 75, 86, 121-123. Bertiaume admitted that compression of the jugular vein—which carries blood from the brain back to the heart—for three to five seconds, could have resulted in the petechial hemorrhage suffered by Mejia Albino. 8RP 95-96. She admitted an occluded jugular vein could not cause a person's death if the person never losses consciousness. Id.

The defense presented the testimony of Dr. Clifford Nelson, a certified forensic pathologist and Oregon State deputy medical examiner. Dr. Nelson reviewed Mejia Albino's medical records. 9RP 11-21. He opined it appeared Mejia Albino was strangled with wide soft cloth, and the petechial hemorrhage she exhibited would have required three to four pounds of pressure on her jugular vein for less than one to a couple of seconds. Mejia Albino's carotid artery was not occluded. It was possible Mejia Albino was strangled for up to ten seconds. 9RP 21-22, 26, 36-37, 49.

Dr. Nelson agreed with the two doctors who saw Mejia Albino following the incident that she did not suffer any life threatening injuries, nor did she lose consciousness. 9RP 23, 33, 37. Dr. Nelson also testified there is no way to know whether compression of the jugular vein could ever cause a person's death. 9RP 39-40. Contrary to Bertiaume's testimony that a person who has been strangled but does not exhibit any

life threatening injuries could develop later complications. Dr. Nelson testified no medical evidence and no medical literature supports that supposition. 9RP 23-24. He opined there was no medical reason that required Mejia Albino to stay in the hospital following her examination by the trauma physician. 9RP 42.

C. ARGUMENT

1. GUZMAN RODRIGUEZ'S CONVICTIONS FOR ATTEMPTED MURDER AND FIRST DEGREE ASSAULT VIOLATE DOUBLE JEOPARDY.

At sentencing Guzman Rodriguez argued that the convictions for both attempted second degree murder and first degree assault were barred by double jeopardy because both offenses were the same in law and in fact. 12RP 20. In response the court indicated it ruled the two offense were the same criminal conduct but "I didn't rule that it merged." 12RP 31.[2]

Under the double jeopardy provisions of the United States and Washington constitutions, a person may not be convicted or punished more than once for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); State v.

[2] "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." State v. Freeman, 153 Wn.2d 765, 772-773, 108 P.3d 753 (2005).

Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). If an act supports charges under multiple statutes, the court must determine whether the Legislature intended to authorize multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the statutes do not expressly disclose legislative intent, the court considers whether the offenses are identical in fact and in law. Id. at 777; State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932)). Double jeopardy claims are reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

The plain language of the statutes at issue here does not explicitly authorize multiple punishment for the same conduct. Orange, 152 Wn.2d at 816. Because multiple punishment for the same conduct is not authorized, this Court must engage in the Blockburger analysis. Hughes, 166 Wn.2d at 682 n.6. Under that analysis, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Blockburger, 284 U.S. at 304. Also known as the same elements or same evidence test, the Blockburger analysis finds a double jeopardy violation when the evidence required to support a conviction of one charged crime would have been sufficient to warrant a conviction upon the other.

Orange, 152 Wn.2d at 820 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) and Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

Generally, if each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same. Orange, 152 Wn.2d at 816–18. The court engages in a commonsense, rather than mechanical, comparison of elements. See, Orange, 152 Wn.2d at 817-18 (merely comparing elements at abstract level misapplies the Blockburger test). But, "[W]here one of the two crimes is an attempt crime, the test requires further refinement." In re Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). This is because one of the elements of an attempt crime is that the defendant "'does any act which is a substantial step toward the commission of that crime.'" Borrero, 161 Wn.2d at 537 (quoting former RCW 9A.28.020(1) (1975)). The "substantial step" element is merely a placeholder until the facts of the particular case give it independent meaning. Borrero, 161 Wn.2d at 537; Orange, 152 Wn.2d at 819. "Only by examining the actual facts constituting the 'substantial step' can the determination be made that the defendant's double jeopardy rights have been violated." Borrero, 161 Wn.2d at 537.

Guzman Rodriguez was charged with the first degree assault of Mejia Albino. The jury was instructed that to find Guzman Rodriguez

guilty of the assault, the state was required to prove he acted with intent to inflict great bodily harm and the assault was committed with a deadly weapon or by any force or means likely to produce great bodily harm or death (RCW 9A.36.011(a)), or alternatively the assault resulted the infliction of great bodily harm (RCW 9A.36.011(c)). CP 54. The jury only found Guzman Rodriguez guilty under the "with a deadly weapon or by any force or means likely to produce great bodily harm or death" alternative. CP 83.

Guzman Rodriguez was also charged with first degree attempted murder of Mejia Albino. The jury acquitted him of the attempted first degree murder but found him guilty of lesser degree crime of second degree attempted murder. CP 76-77. The jury was instructed that second degree murder requires the intent to cause the death of another person. CP 48, 49; see RCW 9A.32.050 (1)(a). To convict Guzman Rodriguez of attempted second degree murder, the jury was instructed consistent with the statute that the state was required to prove that he engaged in an act "which is a substantial step toward the commission of that crime." CP 41; RCW 9A.28.020(1). A substantial step must be " 'strongly corroborative of the actor's criminal purpose.'" State v. Workman, 90 Wn.2d 443, 451–52, 584 P.2d 382 (1978) (mere preparation is not enough to show a "substantial step" quoting Model Penal Code § 5.01(2)). The jury was

similarly instructed that a "substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 42.

The only "substantial step" that strongly indicated Guzman Rodriguez's criminal purpose (intent to cause Mejia Albino's death) was Guzman Rodriguez strangulating Mejia Albino. The assault was likewise committed by strangulating Mejia Albino, which is reflected in the jury's finding the assault was committed with a deadly weapon or force or means likely to produce great bodily harm or death and its failure to unanimously agree on the infliction of great bodily harm alternative means. The evidence required to support the attempted murder conviction was sufficient to support the first degree assault conviction.

This case is substantially similar to Orange. There, Orange fired multiple shots, killing one person and wounding Marcel Walker. Orange, 152 Wn.2d at 801. Orange was charged and convicted of both first degree attempted murder of Walker and first degree assault of Walker. Our Supreme Court reasoned that shooting Walker was the substantial step to support the attempted murder and shooting Walker supported the first degree assault committed with a firearm. Thus, the Court held that under the Blockburger analysis the convictions for both attempted murder and first degree assault violated double jeopardy because the evidence required

to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault, thus the attempted murder and assault were the same in fact and in law. Orange, 152 Wn.2d at 820.

The Orange decision was not the first to hold that convictions for both attempted murder and assault violated double jeopardy. In State v. Valentine, 108 Wn.App. 24, 29 P.3d 42 (2001) the court also held Valentine's convictions for second degree attempted murder and first degree assault (the same offenses in this case) violated double jeopardy. In that case Valentine attacked his girlfriend with a knife and almost killed her. A jury found him guilty of first degree assault and second degree attempted murder. Although the Orange Court noted the Valentine court misapplied the Blockburger analysis, it found the "Valentine decision arrived at the correct conclusion--that prosecution for attempted murder and assault based on the same act violates double jeopardy..." Orange, 152 Wn.2d at 820. It reached that conclusion because the evidence required to support the attempted murder conviction was sufficient to support the assault conviction. Id. (citing Reiff, 14 Wash. at 667).

Guzman Rodriguez's criminal purpose was to cause the death of Mejia Albino. The "substantial step" was Guzman Rodriguez strangulating Mejia Albino. It was the same act of strangulation that was the basis for the assault conviction. As in Orange and Valentine, the

evidence required to support the attempted murder conviction supported the first degree assault conviction. As in Orange and Valentine, Guzman Rodriguez's convictions for both those offenses violate double jeopardy.

Under the Blockburger/ Orange analysis Guzman Rodriguez's convictions for both second degree attempted murder and first degree assault violate double jeopardy. When two convictions violate double jeopardy, the crime that carries the lesser penalty must be unconditionally vacated. State v. Turner, 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010). The lesser offense is the conviction that carries the shorter sentence or lesser seriousness level. State v. Hughes, 166 Wn.2d 675, 688 n.13. Second degree murder has a seriousness level of XIV and first degree assault a seriousness level of XII. RCW 9.94A.515. The standard range for an attempt is determined by multiplying the standard range for the completed crime by seventy-five percent. RCW 9.94A.533(2). Thus, the second degree attempted murder conviction carries a standard range sentence of 92.25 to 165 months and the first degree assault conviction carries a standard range sentence of 93-123 months. CP 93. The lesser offense here is the first degree assault. Guzman Rodriguez's first degree assault conviction should be vacated.

2. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL

If Guzman Rodriguez does not prevail on appeal, he asks that no costs of the appeal be awarded under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." State v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. The court found Guzman Rodriguez indigent for the purpose of this appeal. CP 124-128. Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (citing RAP 15.2(f)).

The court also waived all discretionary fees and costs because of Guzman Rodriguez's indigency. 12RP 28-29. Guzman Rodriguez is also facing a lengthy sentence, which will greatly impede his ability to pay the costs of his appeal, and he was ordered to pay $1,734.90 in restitution. CP

129-130. Moreover, it is likely that following his sentence Guzman Rodriguez will be deported. 12RP 22.

In sum, in the event that Guzman Rodriguez does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

D. CONCLUSION

Guzman Rodriguez's conviction for first degree assault should be vacated as violating double jeopardy. Turner, 169 Wn.2d at 465-66.

DATED this 29 day of September 2016.

Respectfully submitted,

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